Supreme Court, U.S.
FILED
SEP 7 1993
OFFICE OF THE CLERK

No. 92-1954

In the Supreme Court of the United States

OCTOBER TERM, 1993

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
DEBORAH RUTH KANT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the sampling methodology selected by the Secretary of Agriculture in implementing the fiscal year 1982 version of the quality-control program mandated by the Food Stamp Act constituted a reasonable exercise of the Secretary's authority under the Act.

2. Whether liability incurred by a State in fiscal year 1982 under a subsequently repealed provision of the Food Stamp Act was preserved by the general savings clause set forth in 1 U.S.C. 109.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Rosado v. *Wyman*, 397 U.S. 397 (1970)	8, 9
Shea v. *Vialpando*, 416 U.S. 251 (1974)	9

Statutes and regulations:

Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, § 126, 94 Stat. 364	2
7 U.S.C. 2025(g) (Supp. V 1981)	2, 3, 4, 5, 10
7 U.S.C. 2025(g)(1) (Supp. V 1981)	2, 7, 10
7 U.S.C. 2025(g)(2)(B) (Supp. V 1981)	7
Food Stamp Act Amendments of 1982, Pub. L. No. 97-253, Tit. I, Subtit. E, 96 Stat. 772:	
§ 180(a)(2), 96 Stat. 782	4
§ 180(a)(3), 96 Stat. 782-783	4
§ 193(b), 96 Stat. 789	4
Food Stamp Act of 1977, 7 U.S.C. 2011 *et seq.*	2
7 U.S.C. 2013(a)	2
7 U.S.C. 2014	2
7 U.S.C. 2025(a)	2
1 U.S.C. 109	4, 5, 10
7 C.F.R. (1982):	
Section 275.3(c)	3
Section 275.25(d)(3)	2, 3
Section 275.25(d)(6)	3

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1954

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A56) is reported at 984 F.2d 514. The opinion of the district court (Pet. App. C1-C38) is reported at 788 F. Supp. 1267.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1993. A petition for rehearing was denied on March 9, 1993. Pet. App. D1-D3. The petition for a writ of certiorari was filed on June 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In order to supplement the nutritional needs of low income families, Congress created the food stamp program in 1964. See 7 U.S.C. 2011 *et seq.* Under that program, the Food and Nutrition Service of the United States Department of Agriculture provides food stamp coupons to participating States for distribution to qualified individuals and households based on need. 7 U.S.C. 2013(a), 2014. The cost of the food stamps is borne entirely by the United States; the cost incurred by each participating State in the administration of the program is, as a general rule, divided equally between the State and the federal government. 7 U.S.C. 2025(a).

In 1977, Congress authorized the Secretary of Agriculture to institute a quality-control program whereby each participating State and the federal government would monitor the accuracy of the State's system of food stamp issuance to determine the percentage of the total food stamps issued by the State that were issued in error. As amended in 1980, the applicable statute required the Secretary to impose "error liability" on a State when its "payment error rate, as determined by the Secretary, for each six-month period," exceeded the statutory target rate. Food Stamp Act Amendments of 1980, Pub. L. No. 96-249, § 126, 94 Stat. 364, codified at 7 U.S.C. 2025(g)(1) (Supp. V 1981). The Secretary calculated the amount of a State's error liability by multiplying the total dollar value of food stamps issued by the State during the relevant time period by the difference between the State's estimated error rate and the statutory target rate. 7 U.S.C. 2025(g) (Supp. V 1981); 7 C.F.R. 275.25(d)(3) (1982).

During fiscal year 1982, the Secretary employed a sampling methodology for calculating state error rates for purposes of the quality-control program. Recogniz-

ing the infeasibility of monitoring and reviewing every household putatively eligible for food stamps, the quality-control regulations mandated a statistical sampling method whereby each State selected a sample of households from which to extrapolate the state error rate. The Secretary then reviewed the State's estimated error rate by examining a statistically significant portion of the State's sample. Any differences in the error rates computed by those two methods were then reconciled through a regression formula to yield a single estimate of the state error rate, which was used in calculating the appropriate liability amount, if any. See 7 C.F.R. 275.3(c), 275.25(d)(6) (1982); 7 U.S.C. 2025(g) (Supp. V 1981).

2. In this case, the Secretary imposed an error liability amount of $1,323,864 on petitioner as a result of its excess error rate during the second half of fiscal year 1982. Pet. App. A8.[1] On June 20, 1985, the State Food Stamp Appeals Board (a component of the Food and Nutrition Service) affirmed that decision, declaring that the Secretary's sampling procedures embodied a "standard statistical procedure" that provided "the best estimate of the true error rate." 4 Admin. Rec. (AR) 1979.[2]

---

[1] The statutory target rate for that time period was 14.88%, and the Secretary, pursuant to the applicable regulations, determined that petitioner's estimated error rate was 16.35%. Pet. App. A7-A8. Because petitioner's error rate exceeded the target rate by 1.47 percentage points, that percentage was multiplied by the total value of the food stamps issued by petitioner during the relevant time period to yield the amount of petitioner's liability. *Ibid.*; see 7 C.F.R. 275.25(d)(3) (1982).

[2] The Board also denied petitioner's request for a good-cause waiver of the liability amount. AR 1979. The Board reasoned that there were no unique circumstances justifying petitioner's excessive error rate, and concluded that the corrective actions undertaken by petitioner were merely part of the expected course of

3. The district court upheld the imposition of the liability. Pet. App. C1-C38. The court rejected petitioner's argument that its error liability for the second half of fiscal year 1982 was eliminated when Congress repealed 7 U.S.C. 2025(g) (Supp. V 1981) as part of its revision of the quality-control program for fiscal years 1983 and beyond. Pet. App. C3 n.3; see Food Stamp Act Amendments of 1982, Pub. L. No. 97-253, Tit. I, Subtit. E, §§ 180(a)(2) and (3), 193(b), 96 Stat. 782-783, 789 (eff. Oct. 1, 1982). The district court reasoned that under the general savings clause, 1 U.S.C. 109, liabilities imposed by statute survive the repeal of the underlying statute unless the repealing Act explicitly provides otherwise. The 1982 amendments to the quality-control program did not expressly provide for elimination of liabilities imposed under prior law, and thus liabilities arising under 7 U.S.C. 2025(g) (Supp. V 1981) remained valid. Pet. App. C3 n.3.

The district court also held that the Secretary's sampling regulations utilized a valid statistical methodology that provided an efficient means of determining state error rates and liabilities. Pet. App. C17-C25. The court noted that while "some bias against the states does arise from the use of the [Secretary's] sampling method," the alternative methods proposed by petitioner "do not eliminate [the bias] and, indeed, may merely shift the bias to the federal government." *Id.* at C18, C20-C21. Given the Secretary's wide latitude in promulgating regulations under the Food Stamp Act and the fact that the Secretary's sampling regulations used a valid and standard statistical methodology, the district court concluded that it was not empowered to second-guess the Secretary's selection of that methodology in favor of arguably "more equitable" alternatives. *Id.* at C23-C25.

---

conduct required for proper management of the food stamp program. *Ibid.*

4. The court of appeals affirmed. Pet. App. A1-A56. The court first held that Congress's repeal of 7 U.S.C. 2025(g) (Supp. V 1981) as part of the Food Stamp Act Amendments of 1982 did not retroactively revoke the Secretary's authority to impose error liability on petitioner for fiscal year 1982. Pet. App. A8-A16. The court explained that 1 U.S.C. 109 operates to preserve liabilities "incurred" under subsequently repealed statutes, and concluded that petitioner's error liability was "incurred" at the conclusion of the six-month period to which the liability related, *i.e.*, on September 30, 1982, one day before the effective date of the 1982 amendments. Pet. App. A11-A12.

The court rejected petitioner's argument that its liability for the last half of fiscal year 1982 was not "incurred" at the end of that period because the quality-control program allowed States to obtain waivers of their error liability based on corrective measures taken *after* the conclusion of the time period to which the error liability amount applied. Pet. App. A11-A16. The court explained that "the savings statute was designed to prevent exactly the sort of lapse that [petitioner] argues occurred here," and that reading the statute as petitioner sought would "hamper the law's goal." *Id.* at A13.

Moreover, the court found that the structure of the Food Stamp Act "predicate[d] waiver on precedent liability" (Pet. App. A14), and that Congress's intent in enacting the 1982 amendments supported preservation of liabilities arising under the prior law. *Id.* at A15-A16. The court explained that the purpose of the 1982 amendments was to increase the certainty of error liability; that purpose made it "unlikely" that Congress intended to preclude enforcement of the earlier statutory scheme in cases in which good-cause waiver determinations had not yet been made. *Ibid.*

The court of appeals also upheld the validity of the Secretary's sampling methodology. The court noted that the Secretary's methodology was "no different than any other statistical sampling in that it cannot produce results that reflect the actual error rate with unerring accuracy." Pet. App. A23. Instead, any available sampling method would sometimes overestimate or underestimate a State's actual error rate. *Ibid.* The court also observed that the various alternative statistical methods for determining state error rates each had "incumbent advantages and disadvantages," and concluded that the courts were not empowered to "rethink the [Secretary's] choice among the various options" so long as that choice was a reasonable one. *Id.* at A25-A26.

The court of appeals acknowledged that the sampling methodology employed by the Secretary might operate to a State's disadvantage, because a State could incur additional liability as a result of an overestimate but might not receive a corresponding benefit as a result of an underestimate. Pet. App. A24. The court held, however, that the Secretary's methodology was not rendered invalid by that fact, because petitioner had failed to demonstrate that "the system selected by [the Secretary] is an irrational one, that it is arbitrarily conceived, that it is profoundly flawed, or that it operates in a wholly capricious manner." *Id.* at A28. The court explained that "Congress directed that the error rate was to be 'determined by the Secretary,'" and noted that the Secretary's choice embodied an indisputably "routine statistical sampling" method. *Id.* at A28-A29. Accordingly, there was no basis for rejecting the Secretary's chosen method in favor of petitioner's preferred alternatives, which "would not necessarily have represented an improvement" because they "would by all accounts be more complicated to administer and could well prove less of a deterrent to administrative errors." *Id.* at A29.

ARGUMENT

1. Petitioner contends (Pet. 15-34) that the alleged unfairness to the States resulting from the Secretary's choice of sampling methodology renders that methodology invalid as a means of determining state error rates for purposes of the Food Stamp Act's quality-control program. According to petitioner, the Secretary should have selected a different statistical estimating method in order to minimize the possibility that the margin of error inherent in all statistical methods would redound to petitioner's detriment. That contention is incorrect, and in any event is not worthy of review.

a. During the time period relevant to this case, the applicable statute defined a State's "payment error rate" as "the percentage of all food stamp allotments which are issued [erroneously] in a given period by a State agency." 7 U.S.C. 2025(g)(2)(B) (Supp. V 1981). That statutory definition did not purport to mandate the selection of one particular statistical estimating method over another.[3] To the contrary, the statute plainly left that decision to the Secretary, because it made clear that each State's liability under the quality-control program was to be determined by reference to the State's "payment error rate, *as determined by the Secretary*." 7 U.S.C. 2025(g)(1) (Supp. V 1981) (emphasis added).

---

[3] Petitioner appears to suggest (Pet. 23-24) that the statutory text can be read to require perfect precision in the Secretary's computation of state liability amounts. No statistical sampling method can guarantee perfect accuracy of results in every instance, however, and thus any such method will inevitably yield errors of some form in individual cases. Petitioner's preferred methods of calculating state liability would themselves lead to erroneous results in at least some instances (see Pet. App. C20-C21), and thus there is no basis for reading the statute to require adoption of those methods in lieu of the one selected by the Secretary.

The method chosen by the Secretary for determining state error rates was a reasonable one, and accordingly there is no basis for overturning the Secretary's regulation adopting that method. As petitioner conceded below, the Secretary's statistical methodology is consistent with "routine statistical sampling." Pet. App. A29. Moreover, as the courts below found, the various alternatives proposed by petitioner suffer from flaws of their own, and might be less effective in achieving the statutory goal of deterring error. *Id.* at A29, C20-C21.[4] The fact that an agency's preferred statistical methodology may operate unfairly or achieve somewhat imperfect results in some circumstances does not empower courts to second-guess the agency's selection of that methodology from among various alternatives, each with its own advantages and disadvantages.

b. Petitioner errs in contending (Pet. 28-34) that *Rosado* v. *Wyman*, 397 U.S. 397, 419-420 (1970), dictates a different result. *Rosado* held that the State of New York was prohibited by federal law from substantially reducing the standard of need for recipients of Aid to Families with Dependent Children (AFDC), absent a demonstration that the items formerly included in computing the standard of need were not "part of the reality of existence for the majority of welfare recipients." *Id.* at 419. The Court then observed in dictum that the State was not barred from consolidating various components of the standard-of-need calculation "on the basis of statistical averages," so long as "all factors in the old equation are

---

[4] Petitioner's assertion (Pet. 22 n.12) that the bias against it could be eliminated by the use of alternative methodologies ignores the fact that, as the courts below explained (Pet. App. A25, A28, C20-C21), each methodology has competing advantages, disadvantages, and biases. Nothing in the statute requires adoption of the statistical method that is most favorable to petitioner.

accounted for and fairly priced" and "the consolidation on a statistical basis reflects a fair averaging." *Ibid.*

The *Rosado* Court did not explain what a "fair" statistical methodology might be in the context of the AFDC program, nor did it purport to announce standards applicable to the entirely different statutory scheme at issue in this case. *Rosado* is thus of no relevance to the question presented here. Moreover, even if *Rosado* had held that all administrative use of statistical methodology must be "fair," there would be no basis for disturbing the judgment in this case. As the court of appeals found (Pet. App. A29), the Secretary's regulations adopt a standard and accepted statistical method for calculating the state error rate. Thus, those regulations do not run afoul of *Rosado*.[5]

c. There is no circuit conflict on the question of the validity of the Secretary's methodology for computing the States' error liability under the 1980 version of the quality-control program. Indeed, as petitioner's *amici* concede, that question is one of first impression in the federal courts. State of California *et al.* Amici Br. 1. Accordingly, further review is not warranted.

---

[5] Petitioner's *amici* also err in asserting (State of California *et al.* Amici Br. 18) that the decision below conflicts with *Shea* v. *Vialpando*, 416 U.S. 251 (1974). In *Shea*, the Court held that the text and legislative history of the statute at issue in that case precluded the State of Colorado from using a statistical averaging method to calculate the amount by which the income of AFDC applicants should be reduced to reflect employment-related expenses. *Id.* at 258-266. The *Shea* Court's conclusion that a different statutory scheme precluded the use of statistical methods sheds no light on the question at issue in this case, which is whether the Secretary erred in selecting one statistical method over another for purposes of computing the state error rate under the food stamp program.

2. Petitioner also contends (Pet. 34-45) that Congress's 1982 decision to replace the 1980 version of the quality-control program with a new program applicable to fiscal years 1983 and beyond retroactively abrogated the Secretary's authority to impose error liability under the 1980 law. As the court of appeals held, however, the general savings clause, 1 U.S.C. 109, was enacted precisely in order to eliminate the type of technical abatement or gap in coverage that petitioner seeks to create here. See Pet. App. A12-A13. Under Section 109, the repeal of any statute does not operate to "release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall so expressly provide."

Nothing in the text of the 1982 amendments explicitly abrogates the liability imposed on petitioner under 7 U.S.C. 2025(g) (Supp. V 1981) for the last half of fiscal year 1982. Petitioner contends (Pet. 39-45), however, that it had not "incurred" any liability under Section 2025(g)(1) by the time that statute was repealed in October 1982. In support of that contention, petitioner points to the fact that its obligation was subject to possible waiver in light of subsequent events.

Petitioner's argument is inconsistent with the structure of the statute. As the court of appeals held, "the statutory structure predicates waiver on precedent liability," thereby indicating that the imposition of liability occurs independently of, and prior to, the *post hoc* waiver determination. See Pet. App. A14-A15. It is therefore irrelevant that petitioner's liability was theoretically subject to waiver based on petitioner's after-the-fact remediation efforts; the liability had already been incurred when the 1982 amendments took effect, and it survived repeal of the 1980 version of Section 2025(g).

In any event, the question whether the 1982 amendments abrogated the Secretary's authority to impose

sanctions for fiscal year 1982 has no prospective importance, and there is no circuit conflict on that question. Accordingly, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA C. BIDDLE
DEBORAH RUTH KANT
Attorneys

SEPTEMBER 1993